Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

WILLIAM FRANKLIN AUSTIN,

Petitioner

v.

CYNTHIA LEE DAWSON-AUSTIN,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question No. 1

Is the physical presence of real and personal property in a state sufficient to give that state the jurisdiction to adjudicate ownership rights in that property?

Question No. 2

Does the Fourteenth Amendment permit Texas to divide property located within Texas upon divorce, even without personal jurisdiction over the non-resident spouse?

Question No. 3

Does the Fourteenth Amendment permit the Texas divorce court to declare the Texas spouse to be owner of shares of stock he owned prior to marriage, even without personal jurisdiction over the other spouse?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Texas are those listed in the caption:

Petitioner

William Franklin Austin
5334 Harbor Town
Dallas, Texas 75287

Respondent

Cynthia Lee Dawson-Austin
70661 Oroville Circle
Rancho Mirage, California 92270

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CITATION OF OPINIONS BELOW

The opinion of the Supreme Court of Texas under review is published at *Dawson-Austin v. Austin*, 968 S.W.2d 319 (Tex. 1990). A copy of the Opinion is included in the Appendix to this Petition as Item 4, p. A-209.

The Court of Appeals opinion issued February 29, 1996, is published at *Dawson-Austin v. Austin*, 920 S.W.2d 776 (Tex. App. — Dallas 1996), *rev'd*, 968 S.W.2d 319 (Tex. 1998). A copy of the Opinion is included in the Appendix to this Petition as Item 3, p. A-159.

JURISDICTION

The judgment of the Supreme Court of Texas was issued on February 13, 1998. *See* Appendix, Item 5, p. A-240. The Clerk's letter indicating that on July 3, 1998, the Supreme Court of Texas overruled Petitioner's Motion for Rehearing is included in the Appendix as Item 6, p. A-242.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

> deny to any person within its jurisdiction the equal protection of the laws.

[Appendix, Item 7, p. A-244]

STATEMENT OF THE CASE

In this divorce case, both spouses left their marital domicile in Minnesota, with Husband (Petitioner William Franklin Austin) moving to Texas and with Wife (respondent Cynthia Lee Dawson-Austin) moving to California. Divorces were filed in both states. Wife appeared generally in the Texas divorce for all purposes, except division of property. [T. 39] The Texas court divided the parties' property, located in Texas and various other states, and declared Husband to be the sole owner of his Starkey Laboratories, Inc. stock, which was owned by him prior to marriage and the situs of which was Texas. The Texas Court of Appeals affirmed the trial court's ruling on Texas' jurisdiction over Wife, 920 S.W.2d at 783, and in all other respects. The Texas Supreme Court reversed, holding that, under the Fourteenth Amendment to the U.S. Constitution, Texas had no personal jurisdiction over Wife, and that Husband's Texas domicile and the presence of real and personal property in Texas did not afford the Texas court the power to divide those marital assets or even confirm Husband's premarital stock as his separate property. *Dawson-Austin v. Austin*, 968 S.W.2d 319, 327 (Tex. 1998). Citing *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Texas Supreme Court said:

> In the present case, the location in Texas of property that either is or is claimed to be part of the marital estate does not supply the minimum contacts required for the court to exercise jurisdiction over Dawson-Austin.

This holding was challenged by timely motion for rehearing, which was overruled. The federal question has been timely and properly raised.

REASONS CERTIORARI SHOULD BE GRANTED

This case will resolve a significant, continuing uncertainty about in rem and quasi in rem jurisdiction, arising from confusion about this Court's ruling in *Shaffer v. Heitner*, 433 U.S. 186 (1977), and the impact of this Court's decision in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). The issue is whether the mere presence of property in a State establishes a sufficient relationship between the owner of the property and the State to justify the exercise of jurisdiction to adjudicate ownership rights in that property, consistent with the Fourteenth Amendment to the U.S. Constitution. The supreme courts of Texas and of Georgia have ruled oppositely on this point, and granting certiorari will resolve this important issue.

The constitutional question arises in this case from a divorce where Husband and Wife live in different states. With divorce and relocation being as prevalent as they are today, state courts have been, and will continue to be, confronted with the question of the constitutional limits for dividing property upon divorce when spouses live in different states.

Granting certiorari also will resolve the constitutional question for commercial cases whether a state can adjudicate ownership rights to real and personal property located in-state, when some owners are non-residents and have no other ties to the state.

And granting certiorari also will resolve the constitutional question for land title litigation — can the forum state exercise jurisdiction when a non-resident acquires title to land

through bequest or purchase, but has no other ties to the state where the land is located?

Long ago this Court held that a state can dissolve the bonds of matrimony between a domiciliary and a non-resident spouse, even without personal jurisdiction over the non-resident spouse. *Williams v. North Carolina,* 317 U.S. 287 (1942). *Williams* left unresolved the jurisdictional basis for litigating other aspects of divorce, such as alimony, child support, and property division. In *Estin v. Estin,* 334 U.S. 541 (1948), this Court ruled that personal jurisdiction is required to adjudicate a spouse's alimony obligation. In *Kulko v. Superior Court of California,* 436 U.S. 84 (1978), this Court ruled that personal jurisdiction is required to impose a child support obligation on a non-resident parent. This Court has *never* determined what jurisdictional tie is required to divide property on divorce.

In this case, the Supreme Court of Texas ruled that, under the Fourteenth Amendment, the fact that one spouse is domiciled in Texas, and that property is located in Texas, is not enough to support dividing the Texas property in a Texas divorce. The Supreme Court of Georgia has ruled the exact opposite. *Abernathy v. Abernathy,* 482 S.E.2d 265 (Ga. 1997). [Appendix, Item 8, p. A-245.] This Court should resolve the dispute for the many Americans who find themselves in this jurisdictional quandary when their marriages are breaking up. The ruling will resolve the jurisdictional issue for commercial and land title litigation, as well.

ARGUMENT

Question No. 1
[Restated]

Is the physical presence of real and personal property in a state sufficient to give that state the jurisdiction to adjudicate ownership rights in that property?

Question No. 2
[Restated]

Does the Fourteenth Amendment permit Texas to divide property located within Texas upon divorce, even without personal jurisdiction over the non-resident spouse?

Question No. 3
[Restated]

Does the Fourteenth Amendment permit the Texas divorce court to declare the Texas spouse to be owner of shares of stock he owned prior to marriage, even without personal jurisdiction over the other spouse?

Supreme Court Precedent

In *Pennoyer v. Neff*, 95 U.S. 714 (1877), this Court held that a state could exercise jurisdiction over property within its borders and determine the rights and interests of non-residents. In *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945), this Court held that a state could exercise in personam jurisdiction over a non-resident defen-

dant, as long as the non-resident had certain minimum contacts with the state such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." In *Shaffer v. Heitner*, 433 U.S. 186, 213 (1977), this Court concluded that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe*. Thus, in *Shaffer*, this Court held that the mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State so as to support the exercise of jurisdiction over an *unrelated* cause of action. The Court noted, however, that "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction." 433 U.S. at 208.

Overview of the Case

In the present case, both parties abandoned their marital domicile of Minnesota. Wife moved with some personal property to California, while Husband moved with some personal property to Texas. At the time of the Texas divorce, the Texas court awarded various assets to Wife, including real property in California, New Jersey, Oregon, and Florida. [Final Decree of Divorce, T. 2285, Appendix, Item 1, p. A-14] The Court awarded Husband various assets, including real property in Minnesota, New Jersey, Oregon, Missouri, and Texas. [Final Decree of Divorce, T. 2283, Appendix, Item 1, p. A-12] The Texas court also awarded Husband furniture, clothing, money in Texas banks, and other assets [Final Decree of Divorce, T. 2284, Appendix, Item 1, p. A-13] The Texas court also declared that Husband's shares of stock in Starkey Laboratories, Inc., which belonged to Husband prior to marriage, were his separate property. [Final Decree of Divorce, T. 2276, Appendix, Item 1, p. A-3] The Texas Court

found the situs of such shares to be in Texas. [Conclusion of Law No. 4.a, T. 2340, Appendix, Item 2, p. A-107] On appeal, the Texas Supreme Court reversed the property division in its entirety, saying that "the location in Texas of property that either is or is claimed to be part of the marital estate does not supply the minimum contacts required for the court to exercise jurisdiction over [Wife]." *Dawson-Austin v. Austin*, 968 S.W.2d 319, 327 (Tex. 1998).

Contradictory Ruling From Georgia Supreme Court

The Supreme Court of Georgia has ruled oppositely to the Texas Supreme Court on this exact issue. In *Abernathy v. Abernathy*, 482 S.E.2d 265 (Ga. 1997) [Appendix, Item 8, p. A-245], the parties lived in Louisiana during their marriage. Upon separation, the husband moved to Georgia and a year later filed for divorce. The wife moved to dismiss, but the trial court held that it had jurisdiction to divide property located within the state. The Georgia Supreme Court affirmed this decision saying:

> A lack of personal jurisdiction does not prevent the trial court from entering certain other judgments in rem. Personal jurisdiction in Georgia may be required in order to obtain a judgment which will personally bind a non-resident defendant as to marital property located in another forum . . . . However, notwithstanding a lack of personal jurisdiction over the defendant in a divorce case, a trial court can render a valid judgment in rem with respect to the res of the property within its territory.

482 S.E.2d at 267

In considering an argument that the absent spouse did not have personal direct contact with Georgia, the Georgia Supreme Court replied:

> The limited holding of *Shaffer* . . . is that the mere presence of property in a state, standing alone, will not constitute sufficient "minimum contacts" to support the state's exercise of its in rem jurisdiction, *if* the property is unrelated to the underlying cause of action. Thus, the "minimum contacts" standard does not foreclose the exercise of state-court jurisdiction over a true in rem action or a case wherein the plaintiff "is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons," or "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant." . . . Obviously, a dispute between divorcing resident and non-resident parties as to marital property located in Georgia would constitute such a claim. In such a case, there is more than the mere presence of property to support the in rem jurisdiction of a Georgia court[.]

482 S.E.2d at 268. Two dissenting justices noted that the wife never consented to the husband bringing marital property into Georgia. 482 S.E.2d at 272. However, the majority recognized that consent to bringing the property in-state is not a condition for the state to have adjudicative power.

Controlling U.S. Supreme Court Precedent Examined

Shaffer v. Heitner. The Texas Supreme Court relied upon a misinterpretation of *Shaffer v. Heitner*, 433 U.S. 186 (1977). In *Shaffer*, the owner of one share of Greyhound Corp. stock filed a shareholder's derivative suit in a Delaware court, against 28 present and former officers of the corpora-

tion who were non-residents of Delaware. Jurisdiction was premised on a legal fiction in Delaware law that all stock in a Delaware corporation had its situs in Delaware. In actuality, none of the shares "seized" for jurisdictional purposes were situated in Delaware. *Id.* at 192. The suit was for actions occurring in Oregon that subjected the corporation to liability for antitrust violations and for criminal contempt. Thus, the issues in the suit were unrelated to the shares of stock which formed the basis for Delaware's jurisdiction. This Court held that the fictional situs of the stock in Delaware did not provide a sufficient basis for Delaware to exercise jurisdiction over non-resident defendants on claims that were unrelated to the stock. *Id.* at 213. However, the Court observed:

> [W]hen claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction.

Id. at 208.

Shaffer thus recognized the validity of a state exercising jurisdiction to litigate a non-resident's claims to property located within the state — where the property is the subject matter of the litigation or the litigation is related to the property. This distinction — between claims that *are* related to the in-state property and claims that are *not* related to the in-state property — which was central to the reasoning in *Shaffer,* was overlooked by the Texas Supreme Court.

The import of *Shaffer* was reconfirmed by the Court's words in the later case of *Rush v. Savchuk,* 444 U.S. 320 (1980), where the Court characterized *Shaffer* in the following manner:

> We held in *Shaffer* that the mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support

> the exercise of jurisdiction over an *unrelated* cause of action. [Emphasis added.]

444 U.S. at 328. The Court reaffirmed that the key to *Shaffer* was that the litigation was unrelated to the property in the state.

Burnham v. Superior Court. In the more recent family law case of *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), a New Jersey resident was served with divorce papers while visiting his minor children in California. The issue was whether personal service in-state was, in and of itself, sufficient to support California's exercise of jurisdiction. In the lead Opinion, Justice Scalia noted that the constitutional test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), was whether the state's exercise of jurisdiction violated "traditional notions of fair play and substantial justice." *Id.* at 609. He wrote that in *Burnham*, the test was met because jurisdiction based upon in-state service of process was "one of the continuing traditions of our legal system." 495 U.S. at 619.

Justice Scalia rejected the argument that *Shaffer* requires that jurisdiction arise from the non-resident's activities in the state. Specifically, he said:

> It goes too far to say, as petitioner contends, that *Shaffer* compels the conclusion that a State lacks jurisdiction over an individual unless the litigation arises out of his activities in the State. *Shaffer*, like *International Shoe*, involved jurisdiction over an *absent defendant*, and it stands for nothing more than the proposition that, when the "minimum contact" that is a substitute for physical presence consists of property ownership, it must, like other minimum contacts, be related to the litigation.

495 U.S. at 620.

Because, in the present case, claims in Texas property are the basis of the litigation, it is proper under both *Shaffer* and *Burnham* for the Texas court to adjudicate the Austins' rights respecting realty and personalty located in Texas. As the Court said in *Shaffer*:

> [W]hen claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction.

433 U.S. at 208.

Fair Play and Substantial Justice. Texas' exercise of jurisdiction to adjudicate rights in Texas property also is squarely within *International Shoe Co.'s* concept of "traditional notions of fair play and substantial justice." The American Law Institute's Restatement of the Law reflects the accepted norms of the American legal system, since it constitutes a synthesis of *stare decisis* on a nationwide basis. This case involves land in Texas, money in Texas banks, and corporate shares located in Texas. Four different jurisdictional principles recognized in the RESTATEMENT OF THE LAW (SECOND) CONFLICT OF LAWS [RESTATEMENT] establish that adjudicating spouses' rights in property located in-state fits traditional notions of fair play and substantial justice.

Land. Section 59 of the Restatement, entitled "Judicial Jurisdiction Over Land," provides:

> A state has power to exercise judicial jurisdiction to affect interests in land in the state although a person owning or claiming these interests in land is not personally subject to the judicial jurisdiction of the state.

RESTATEMENT § 59. The Restatement notes: "Authority in support of this rule is imposing."

Chattels. Restatement Section 60, entitled "Judicial Jurisdiction Over Chattel," provides:

> A state has power to exercise judicial jurisdiction to affect interests in a chattel in the state, which is not in the course of transit in interstate or foreign commerce, although a person owning or claiming an interest in the chattel is not personally subject to the judicial jurisdiction of the state.

RESTATEMENT § 60. Note that there is no requirement that the non-resident litigant purposefully avail himself of the privilege of owning property in Texas — a consideration the Texas Supreme Court viewed as determinative. *Dawson-Austin v. Austin*, 968 S.W.2d 319, 327 (Tex. 1998).

Intangible Things Embodied in a Document. Restatement Section 63, entitled "Judicial Jurisdiction Over Intangible Thing Embodied in a Document," provides:

> A state has power to exercise judicial jurisdiction to affect interests in an intangible thing embodied in a document which is within the state.

RESTATEMENT § 63. The Restatement gives the example where A signs a promissory note payable to B, under the law of State X. C claims that B has transferred the note to C, and brings an action to establish ownership of the note in State Y, where the note is located. The Restatement provides that, even when B is not personally subject to the jurisdiction of the courts of State Y, State Y nonetheless has jurisdiction to determine ownership rights in the note between B and C. The Restatement cross-references to Section 64, which relates specifically to corporate shares.

Shares in Corporation. Restatement Section 64, entitled "Judicial Jurisdiction Over Shares in Corporation," provides in part:

> (2) A state has power to exercise judicial jurisdiction to affect interests in a share certificate which is within its territory.

RESTATEMENT § 64(2). This articulation of judicial power is consistent with *Shaffer*'s prescription that "[w]hen claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction." *Shaffer*, 433 U.S. at 208. It is also consistent with the prescription in *Burnham*, that "when the 'minimum contact' that is a substitute for physical presence consists of property ownership, it must, like other minimum contacts, be related to the litigation." *Burnham*, 495 U.S. at 620. And this articulation of judicial power, resulting from the 17-year effort of the American Law Institute to produce the Restatement of Conflict of Laws 2nd (see Introduction, p. ix), is consistent with the prescription in *International Shoe Co.*, that the exercise of jurisdiction must fall within "traditional notions of fair play and substantial justice." 326 U.S. at 316.

No Forum Shopping. Forum shopping is not a consideration in this case. In this regard, the Trial Court made the following finding [Conclusion of Law No. 4.a, T. 2340, Appendix, Item 2, p. A-107], unchallenged by Wife:

> 100% ownership interest in Starkey Laboratories, Inc. was and has been at all times the separate property of WILLIAM FRANKLIN AUSTIN. The Court further finds that the situs of the 60 shares of stock, representing 100% ownership of Starkey Laboratories, Inc., as evidenced by stock certificate number 1, has been at all relevant times during the pendency of this case, in Dallas

> County, Texas and this Court has jurisdiction to make a final and permanent adjudication of its marital character herein. The Court finds that the stock certificate evidencing the 60 shares of stock of Starkey Laboratories, Inc. was not and has not at any relevant time been atypically removed from any other jurisdiction, nor atypically brought to this jurisdiction.

Wife Submitted to Other Texas Jurisdiction. This case is unlike the usual commercial or tort litigation because Wife challenged Texas' jurisdiction only as to the property division, but submitted to Texas' jurisdiction for purposes of marital dissolution, alimony, etc. [T. 39] Thus, Texas had consensual, *personal* jurisdiction over Wife for a variety of issues in the lawsuit. Wife's voluntary presence before the Texas court for these purposes enhances the due process "fairness" of dividing property located in Texas.

Shifting the Cost of Litigation. Divorce litigation is fundamentally unlike commercial or tort litigation, in that the divorce court can make the plaintiff pay the defendant's litigation costs, while the suit is pending. That happened in this case. Husband paid more than $170,000.00 in interim attorney's fees and litigation expenses for Wife prior to trial, and paid an additional $400,000.00 in attorney's fees and expenses to her lawyers after trial. [T. 163, 1660-61] Husband paid for the cost of Wife to transport witnesses to testify at trial. [Finding of Fact No. 6.z, T. 2338, Appendix, Item 2, p. A-105] This shifting of the cost of litigation from the defendant to the plaintiff makes the issue of "fair play" in divorce cases profoundly different from commercial and tort litigation.

Possibility of No Available Forum. This case is also unusual because this is not a jurisdictional contest between a spouse who moved and a spouse who remained at the marital domicile. Here upon separation both parties left the historical

marital domicile, one moving to California and one moving to Texas. Neither party remains domiciled in Minnesota. Some assets are in California and some are in Texas. It makes better sense to divide California assets in California and Texas assets in Texas, than it does to send the parties back to a state where no one lives, or if that state will not accept jurisdiction because neither spouse is a domiciliary, then to tell the spouses that no state can divide their property.

CONCLUSION

The Texas Supreme Court was wrong to conclude that the Fourteenth Amendment prohibited the Texas court's exercise of jurisdiction over the real and personal property located in Texas, or over stock owned by Petitioner prior to marriage. For the foregoing reasons, Petitioner respectfully requests that the Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Texas, and that the judgment of the Texas Supreme Court, premised on a faulty view of the Fourteenth Amendment and of this Court's prior Opinions, be reversed.

Respectfully submitted,

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